Supreme Court of the Hawaiian Islands--In Equity

ROBERT A. MACFIE, JR. vs. KILAUEA SUGAR CO. AND WILLIAM Y. HORNER.

Opinion of Chancellor Judd.

This bill alleges substantially that the plaintiff is the owner of seventy-four and one half shares of the capital stock of the Kilauea Sugar Co., an incorporated company; that on the 10th February, 1880, plaintiff executed a mortgage upon said shares and others which he then held, in all 149 shares, to the firm of H. Hackfeld & Co to secure the payment of $110,697.66 according to the tenor of four promissory notes for 27,673.67 each, payable to the order of said mortgagees on the 31st July of 1881, 1882, 1883 and 1884 respectively. That the first two of said notes have been paid by R. A. Macfie, Sen., of Scotland and one half of the shares are now held by him released from the mortgage, under an agreement which is filed. That by the terms of the mortgage the plaintiff also agreed to secure the payment to H. Hackfeld & Co. of one half of all amounts which might be advanced by them to said Kilauea Sugar Co., and charged up to the plaintiff in account current, until said account current should be closed as provided by the terms of the said mortgage. That plaintiff was at the time of executing the mortgage, the manager of said Kilauea Sugar Co.'s plantation, and had personal supervision and control of all expenditures on the plantation and of all advances drawn for on H. Hackfeld & Co. That plaintiff's being manager was the sole consideration for his agreeing to secure payment of one half of said advances and it was understood that plaintiff was to be individually liable only for advances made while he might be manager. That on the 28th April, 1883, the plaintiff was notified that he had been removed from the office of manager, and upon the 1st May, 1883, that the account current between plaintiff and H. Hackfeld & Co. had been closed and payment demanded of $52,685.76 being 149-300 of the amount due them and being entirely made up of amounts advanced by H. Hackfeld & Co. to the Kilauea Sugar Co. for the purpose of carrying on the plantation, together with interest, commissions and charges, and no part being for the private account or personal use of the plaintiff.

That H. Hackfeld & Co. also from time to time charged the whole sum to the Kilauea Sugar Co. and have not released the said Company from liability to pay same.

That on 30th July last H. Hackfeld & Co. sold and assigned to William Y. Horner, defendant, all their shares and interest in the Kilauea Sugar Co and also the two unpaid notes of plaintiff for $27,673.67 each and also all their rights, title and interest in the mortgage securing the notes and also all their claims against the plaintiff under the same, and also all their claims and demands against the Kilauea Sugar Co. for moneys advanced and other charges in account current.

The bill further alleges that the whole amount of said indebtedness of the Kilauea Sugar Co. in account current is due and payable now, that the undertaking of plaintiff to secure the payment of one half of said amount was a contract of guaranty in favor of H. Hackfeld & Co. and that the debt guaranteed was and is the debt of the Kilauea Sugar Co. and not of the plaintiff. That after demand was made on plaintiff to pay one half of said amount, plaintiff called on the Kilauea Sugar Co. to pay the same which the said Company refused to do. That said Company has now sufficient property to pay the amount in full and that plaintiff is ready and willing to pay one half of any portion of said book debt which may remain unsatisfied after all the property of the corporation has been applied for the payment of the same and exhausted.

The bill prays that the defendant Horner may be enjoined from bringing suit against plaintiff for any portion of said indebtedness of the Kilauea Sugar Co. upon account current until he has exhausted all remedies he may have against said Company; and that the Kilauea Sugar Co. may be ordered to give plaintiff good and sufficient indemnity against any claim which may be made against him on account of said indebtedness and that said Kilauea Sugar Co. may be enjoined from selling or disposing of their property, except crops, or from mortgaging same until they have provided said indemnity etc.

To this bill the defendants demurred, and argument was had thereon on the 27th October. The defendants contend, in substance, that it does not appear by the mortgage on file that R. A. Macfie, Jr., is a surety, but he is rather a principal debtor to H. Hackfeld & Co. and by assignment now to Horner. If however he is a surety, then the relief asked for in his behalf is unknown to equity.

The first point upon which this case hinges is whether the plaintiff is a surety. It is clear that as owner of stock in the Kilauea Sugar Co., an incorporated company, he is not personally liable for the debts of the company unless he has made himself so by the terms of the mortgage. It is also clear that the debt now due on the account current between the Agents and the Kilauea Sugar Co., is primarily the debt of the defendant company. It is alleged in the bill that this debt was for advances in money etc., to carry on and develope the plantation and not for the personal account of the defendant. But we must look to the mortgage to ascertain the nature of the liability of the plaintiff as regards this debt; whether he was an original debtor of H. Hackfeld & Co., and by assignment now of the defendant Horner, or whether he is a surety.

The mortgage recites that the mortgagees have loaned to the mortgagor the sum of $110,697.66 being the purchase-money of the stock in the Kilauea Sugar Co., on the mortgagor's promise to secure repayment thereof and also one half of the balance of future expenses of said plantation and interest etc.,

The mortgage further recites that the mortgagor has given, H. Hackfeld & Co., four notes for the amount of this sum of $110,697.66; And the mortgagor covenants to pay the notes and interest, and also all moneys which may become due and owing from the mortgagor to the mortgagees in account-current with them, to be stated quarterly, and in such accounts current the mortgagor *shall be debited in the first place with one half of all moneys advanced or paid by the mortgagees from the date of the 26th January 1880, on account of said plantation and its laborers, rents, taxes, business and expenses with interest* etc. etc., and be credited with one half of the receipts etc. and that the account shall be considered due on demand. If is clear from the above extracts from the mortgage that the plaintiff agreed that he should be charged with and that his mortgage should secure one half the debt of the plantation thereafter accruing, over and about its receipts, and that this debt is made up of moneys *advanced on account of said plantation*. In short the plaintiff has thus undertaken in writing to secure payment of the debt of another, and has made himself a surety. The debt is one for which the Kilauea Sugar Company is liable, and the bill alleges that H. Hackfeld also from time to time charged the whole sum to the Kilauea Sugar Co., and have not released them from liability to pay the same.

Having found that the plaintiff is a surety for the debt to the Kilauea Sugar Co. I pass to the question whether he can have the relief prayed for. The debt is now due, as stated by the bill, and demanded of plaintiff and he has in turn demanded payment of the same of the Kilauea Sugar Co., and they have refused payment.

In Story's Equity Jur. Sec. 327, the learned Author says, "Sureties, also, are entitled to come into a court of equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt. And although, the creditor is not bound by his general duty to active diligence in collecting the debt, yet it has been said that a surety, when the debt has become due, may come into equity, and compel the creditor to sue for, and collect the debt from the principal, at least, if he will indemnify the creditor against the risk, delay and expense of the suit." And again Section 629. "Courts of Equity do not stop here. If the debt is due and the creditor does not choose to call upon the debtor for payment, the surety may come into equity by a bill against the creditor and the debtor, and compel the latter to make payment of the debt, so as to exonerate the surety from his responsibility; for it is unreasonable that a man should always have such a cloud hang over him."

Further, sec. 849; another case of the application of the remedial justice of courts of equity by a bill of *Quia timet* is in cases of sureties of debtors and others. We have already seen, that if a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor he may file a bill of this sort to compel the debtor to discharge the debt or other obligation, for which the surety is responsible. Nay, it has been insisted (as we have also seen) that the surety may come into equity and compel the creditor to sue the principal, and collect the debt from in discharge of the surety, at least, if the latter will undertake to indemnify the creditor for the risk, delay and expense of the suit."

I have examined all the cases cited in support of this text which are available. They are Wright vs. Simpson, 6 Vesey, 714, where Lord Eldon says on 734, "But in late cases, provided there was no risk, delay or expense, as in the case put, of the money in the next room, indemnifying against the consequences of risk, delay and expense, the surety has a right to call upon the creditor to do the most he can for his benefit; and the latter cases have gone further."

In Nisbet vs. Smith 2 Brown Ch. Rep. 449, Lord Thurlow says, "It is clear and never has been disputed that a surety, generally speaking, may come into this Court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money and deliver him from the obligation."

In King vs. Baldwin 2 Johnson's Ch. Rep. 554 Chancellor Kent reviews all the English cases, and says, p. 561, "The surety has a right, on the day the debt is due, to come into chancery and insist in its being put in suit," and further, "I have said, that the surety has a right, at any time after the debt is due, to apply to this Court, to coerce the creditor to collect his debt." This case went on appeal to the Court of Errors for New York State and is reported in 17 Johnson 384. Chief Justice Spencer says "Courts of Equity when they interpose to compel a creditor, at the instance of a surety, to sue the principal debtor, undoubtedly proceed on the sound and just principle, that it is the duty of the creditor to obtain payment, in the first instance of the principal debtor, and not of the man who is a mere surety that the principal shall pay the debt. The doctrine is, that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit and that the surety has an equity sufficient to invoke the interposition of the powers of a Court of Chancery for his protection."

Wayes vs. Ward 4 Johnson's Ch. Rep. 132 is an authority to the same effect. See also Wooldridge vs. Norris, VI., Law Reports (Eq. Cas.) 410 and Gray vs. Seckham, VII., Law Reports (Ch. appeal cases) 680.

In Burge on Suretyship the writer says, "By the law of England when the liability of the surety has attached in consequence of the default of the principal, the surety—although he has not been sued by the creditor, may apply to a Court of Equity, and compel the principal to relieve him from his liability."

I think sufficient has been quoted above disclosing ample precedent for a bill of this character and I recognise the equity of the principle on which it proceeds.

No point was made at the argument that the bill is defective in not alleging that the plaintiff apprehends loss or injury from the delay of Horner to enforce the debt against the Kilauea Sugar Co., and in the respect that the plaintiff should offer to indemnify Horner for the expense, risk and delay he may suffer by the proceedings to collect the debt of the Kilauea Sugar Co. but I think the bill should be amended in both respects, and sustain the demurrer on this ground with leave to amend in ten days.

F. M. Hatch and E. Preston for plaintiff; P. Neumann and Smith & Thurston for defendants.

Honolulu, November 24th, 1883.

WHAT THE PEOPLE SAY.

We invite expressions of opinion from the public upon all subjects of general interest for insertion under this head of the ADVERTISER. Such communications should be authenticated by the name of the writer as a guarantee of good faith, but not necessarily for publication.

Our object is to offer the fullest opportunity for a variety of popular discussion and inquiry.

We are not to be understood as necessarily endorsing the views set forth in communications published under this head.

To all inquirers we shall endeavor to furnish information of the most complete character on any subject in which they may be interested.]

HONOLULU, November 28, 1883.

MR. EDITOR:—Allow me to inform you in correction of your statement in yesterday's issue of your paper, concerning the unpleasant occurrence in Vogt's barber shop, that no "warm recrimination" whatsoever took place. The facts in the case are simply that the bootblack claimed some payment, and upon being met by my astonishment, struck a blow at me which caused me to defend myself, something any man would do if he were attacked, and in which occurrence I fail to see an "amusing scene."

As to the virtue of the man's claim against me, allow me to state that he was engaged by me some two months ago to do all the work around the place, the attendance of the horse included, for the consideration of $4 50 a week, bed and washing, and the receipts for boot blacking, which alone amounted to $8 some weeks. He agreed to do so and received his pay each week regularly, without demanding anything else. I had left my position at Vogt's barber shop nearly a week before the unpleasant occurrence, and visited the place twice or three times since, and the man never asked me for anything, but on the contrary behaved rather pleasantly towards me. It must be evident to any observer, what prompted that man's action; the man was hired for the job by some of my persecutors.

I am sorry that such an affair should be allowed to be held as a reflection upon the position I have the honor to hold in the Workingmens' Union, or my expressions made in that connection. As I showed before, the bootblack received very good pay under the present system of wages—labor, and your inference at an inconsistency concerning my theories and practices are certainly due to a misapprehension. But had I even denied the man his just dues, which I did not, it would not yet prove the incorrectness of my principles of "allowing to each the full result of his labor." On the contrary, it would simply illustrate the fact, that not individuals, but the system of society is responsible for the present prevailing injustice and misery, and that in order to remove injustice we must go to the root and change the system itself of which individuals are but the victims.

My utterances before the public have always been made with that view, and I hope, therefore, that you will kindly insert this correction in justice to myself. Respectfully Yours,

SIGISMUND DANIELEWIEZ.

Discovery of the Cholera Germ.

It appears from the text of Dr. Koch's report to the German Government of his investigations at Alexandria that the choleraic bacteria were fully revealed by the microscope. In the blood, the liver, the lung, the spleen, the kidneys, and other organs usually affected in germ diseases, no trace of these living organisms was found. On the other hand, in the intestines whole colonies were discovered in every stage of destructive and fatal activity. Details of this character are given, amounting, it may be said in general, to the conclusion that the severity of the cases was in proportion to the abundance of these germs. Dr. Koch does not, however, consider it conclusively established, strongly as the evidence points in that direction, that the bacteria are the cause of the cholera. They may, he observes, be the result of it; or, rather, the infective matter which generates the disease may bring about conditions which favor development of these organisms in the body. At the same time the body of evidence regarding this class of contagious and epidemic disorders leaves little doubt that the germs and the cholera go together. Dr. Koch finds that the nearest resemblance in previously identified bacteria to that of cholera is the thread-like bacillus found in connection with glanders in horses. In order to settle the question whether these microscopic entozoa are causes or effects of cholera, Dr. Koch and his colleagues tried to communicate the disease by means of these germs to rabbits, guinea-pigs, dogs, cats, monkeys, pigs and rats; but these attempts, like all previous ones of the kind, failed. The cholera has never yet been transmitted to any animal but man. When the German Commission reached Alexandria the epidemic was declining rapidly, and the infective poison was diminishing in strength every day. It has, therefore, been arranged to pursue the inquiry in India, "the home of the cholera," and, if possible to investigate some outbreak at its very commencement, when the contagion is most virulent.

POST OFFICE NOTICE.

The General Postoffice is located on the corner of Merchant and Bethel streets, Honolulu. The office is closed on all Hawaiian Holidays.

On Sunday, the General Delivery will be open from 7 till 8 A. M., for the delivery of Island Mails arriving on that day.

On Saturday, the office is closed at 2 o'clock P. M., except on the arrival or departure of a steamer in the afternoon of that day.

Postage Stamps of the following denominations can be purchased: 1, 2, 5, 6, 10, 12, 15, 18, 25, 50 and 100 cents. Also, Postal cards of 1, 2 and 3 cents each, and reply postals of 1 and 2 cents each.

All letters and newspapers sent abroad must be prepaid by Hawaiian stamps only.

Letters, or packages, may be registered to any part of this Kingdom, on payment of a fee of Ten Cents, in addition to the regular postage; and to any country in the Postal Union, on payment of Fifteen Cents, in addition to the ordinary postage.

Packages or parcels of merchandise or other mailable articles, not exceeding four pounds in weight, will be received and conveyed in the inter-island mails only, on prepayment of one cent per ounce postage. Parcels are not mailable to foreign countries (except books only), if exceeding 8½ ounces in weight.

Money Orders.

Domestic Postal Money Orders will be furnished on application at any of the following money order offices, payable at this or any other money order office named below on which it is drawn:

ON HAWAII.	ON MAUI.	ON KAUAI.	ON OAHU.
HILO,	LAHAINA,	LIHUE,	HONOLULU,
KOHALA,	WAILUKU,	KOLOA,	WAIANAE.
HONOKAA,	KAHULUI,	WAIMEA,	ON MOLOKAI.
WAIMEA,	HAMAKUAPOKO,	KAPAA,	KAUNAKAKAI.
KEALAKEKUA,	HANA,	HANALEI.	
WAIOHINU,	MAKAWAO.		
PAHALA.			

21 Money Order Offices.

Foreign Money Orders.

After the 1st of January, 1884, application for Money Orders, payable in the United States, may be made at any Money Order Office in this Kingdom; and they will be drawn at the General Post Office, Honolulu, on any Money Order Office in the United States, of which a list can be seen by inquiring at any Hawaiian Post Office.

Likewise, Money Orders may be drawn in the United States, after January 1, 1884, payable at any Money Order Office in this Kingdom.

H. M. WHITNEY,
Postmaster General.

Honolulu, October, 1883. o27-10tw